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Eminent Domain: The Application of the California Compatibility Requirement to the Corporate Utility Condemnor

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COMMENTS

EMINENT DOMAIN: THE APPLICATION OF THE CALIFORNIA COMPATIBILITY REQUIREMENT TO THE CORPORATE UTILITY CONDEMNOR

The right to take private property for public use, called the power of eminent domain, is a necessary concomitant of government; the state possesses this power as an innate sovereign prerogative.[1] Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely limit its exercise.[2] Like the police power, the power of eminent domain antedates the constitution, and although limited thereby, is not derived therefrom.[3] The only limitations placed upon the exercise of this sovereign power by the Federal[4] and California[5] Constitutions are that the taking be for a public use and that just compensation be made.[6]

The power of eminent domain is bestowed by the people in their sovereign capacity upon the legislature.[7] Pursuant to this mandate,

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[1] Rose v. State, 19 Cal. 2d 713, 719-20, 123 P.2d 505, 510 (1942); People v. Superior Court, 10 Cal. 2d 288, 295, 73 P.2d 1221, 1225 (1937); Gilmer v. Lime Point, 18 Cal. 229, 249-51 (1861); Southern Cal. Gas Co. v. Los Angeles Flood Control Dist., 169 Cal. App. 2d 840, 846, 338 P.2d 29, 33 (1959); University of S. Cal. v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934).

[2] People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); Anaheim Union High School Dist. v. Vieira, 241 Cal. App. 2d 169, 171, 51 Cal. Rptr. 94, 95 (1966).

[3] United States v. Jones, 109 U.S. 513, 518 (1883); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); Moran v. Ross, 79 Cal. 159, 160, 21 P. 547, 548 (1889); *see* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.14[2] (rev. 3d ed. 1962), where it is said: "It is an inherent power, necessary to the very existence of government. . . . It does not require recognition by constitutional provision, but exists in absolute and unlimited form. Under this doctrine, therefore, positive assertion of limitations upon the power is required. This requirement is met by the provisions found in most of the state constitutions relating to the taking of property by eminent domain. Such constitutional provisions neither directly nor impliedly grant the power to eminent domain, but are simple limitations upon a power already in existence which would otherwise be unlimited." (Footnotes omitted).

[4] U.S. CONST. amend. XIV, § 1.

[5] CAL. CONST. art. I, §§ 13-14.

[6] People v. Chevalier, 52 Cal. 2d 299, 304, 306-07, 340 P.2d 598, 601, 603 (1959); Anaheim Union High School Dist. v. Vieira, 241 Cal. App. 2d 169, 171, 51 Cal. Rptr. 94, 95-96 (1966); Port San Luis Harbor Dist. v. Port San Luis Transp. Co., 213 Cal. App. 2d 689, 693, 29 Cal. Rptr. 136, 138 (1936); University of S. Cal. v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934).

[7] People v. Olsen, 109 Cal. App. 523, 530, 203 P. 645, 648 (1930).

the California Legislature in 1872 defined eminent domain as "the right of the people or government to take private property for public use."[8] In addition to defining the power, the legislature elected to create two conditions precedent to its exercise, both supplementary to those imposed by the constitution. First, in addition to the constitutional public use requirement, the legislature provided that it must appear, before property can be taken, "[t]hat the taking is *necessary* to such use."[9] Secondly, it was provided, in section 1242 of the California Code of Civil Procedure, that

> [i]n all cases where land is required for public use, the State, or its agents in charge of such use, may . . . locate the same; but it must be *located in the manner which will be most compatible with the greatest public good and the least private injury* . . . .[10]

The first legislative requisite referred to above is commonly termed the requirement of *necessity*. The second requisite will be referred to henceforth in this comment as the requirement of *compatibility*.

Since the power of eminent domain has been bestowed upon the legislative branch,[11] the question as to which persons, entities, and agencies may exercise it is regulated solely by the legislature.[12] Liberal in this respect, the legislature has provided that

> [a]*ny person* may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure . . . by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure [the Eminent Domain Act] . . . .[13]

This statute operates to confer upon private individuals[14] and private corporations[15] (both hereinafter referred to as "private sector"), as well as upon agencies of the state (hereinafter referred to as "public sector"), the power of eminent domain when necessary to appropriate property for the specified uses. The power so conferred is, of course, not absolute. In addition to the constitutional prerequisites, its exercise has been pre-conditioned by the legislative requirements of *compatibility* and *necessity*.

With respect to the requirement of necessity, the apparent intent of the legislature has been effectuated, for the most part, by the courts. The burden of proof as to this requirement has been placed upon the

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8 CAL. CODE CIV. PROC. § 1237.

9 *Id.* § 1241(2) (emphasis added).

10 Emphasis added. *See also id.* § 1240(6).

11 People v. Olsen, 109 Cal. App. 523, 530, 203 P. 645, 648 (1930).

12 CAL. CODE CIV. PROC. § 1237; *see* People *ex rel.* Public Util. Comm'r v. Fresno, 254 Cal. App. 2d 76, 81, 62 Cal. Rptr. 79, 82 (1967).

13 CAL. CIV. CODE § 1001 (emphasis added).

14 Linggi v. Garovotti, 45 Cal. 2d 20, 23-24, 286 P.2d 15, 17-18 (1955).

15 Moran v. Ross, 79 Cal. 159, 161-62, 21 P. 547, 548 (1889). Since the reference in Civil Code section 1001 to "[a]ny person" includes a corporation, the statute operates to delegate the state's power to condemn to private corporations as well as to individuals and public entities. Los Angeles v. Leavis, 119 Cal. 164, 51 P. 34 (1897); Pasadena v. Stimson, 91 Cal. 238, 248, 27 P. 604, 606 (1891); St. Helena Water Co. v. Forbes, 62 Cal. 182, 183-84 (1882).

condemnor,[16] and this burden must be sustained or the condemnation proceeding will be dismissed.[17] The requirement of necessity, as a condition precedent to the right to take, is thus seen to be both substantial and bona fide.[18]

In regard to *compatibility*, however, the manifested legislative intent has not, in all cases, been so effectuated. The purpose of this comment, therefore, is to examine the application and operation of the *compatibility* requirement, and to examine its efficacy—or lack thereof—as a condition precedent to the exercise of the power to condemn. This examination will be concerned primarily with condemnation proceedings instituted by corporate public utilities. The specific issue in question is whether the requirement of compatibility, as a substantial pre-condition to the exercise of the power of eminent domain, is, as applied to the public utility condemnor, genuine or illusory.

Legislative and Judicial Background

Statutory Presumptions of Compatibility

Generally, the power to condemn may be exercised directly by the state through its immediate officers or agents, or may be delegated by the legislature to public agencies or to members of the private sector.[19] When effecting such delegation, however, the legislature chose to impose the requirement of compatibility, thus sharply curtailing the exercise of the power.

A large class of condemnors, however, has received a statutory exemption from this requirement. Although Code of Civil Procedure section 1241(2) was, as originally enacted, silent on the subject of compatibility,[20] it was amended in 1913 to give a conclusive presump-

[16] Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907); Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891); People v. Van Gorden, 226 Cal. App. 2d 634, 38 Cal. Rptr. 265 (1964); Carlsbad v. Wight, 221 Cal. App. 2d 756, 23 Cal. Rptr. 820 (1963); Black Rock Placer Mining Dist. v. Summit Water & Irr. Co., 56 Cal. App. 2d 513, 133 P.2d 58 (1943); Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 109 P. 896 (1910); Madera Ry. v. Raymond Granite Co., 3 Cal. App. 668, 87 P. 27 (1906).

[17] Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123, 28 P. 447 (1883); Carlsbad v. Wight, 221 Cal. App. 2d 756, 34 Cal. Rptr. 820 (1963); People v. O'Connell Bros., 204 Cal. App. 2d 34, 21 Cal. Rptr. 890 (1962). *See also* Slemons v. Southern Cal. Edison Co., 252 Cal. App. 2d 1022, 60 Cal. Rptr. 785 (1967); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (1961).

[18] Except, of course, where this requirement is conclusively presumed by statute. *See, e.g.*, CAL. CODE CIV. PROC. § 1241(2).

[19] Linggi v. Garovotti, 45 Cal. 2d 20, 23-24, 286 P.2d 15, 17-18 (1955); Moran v. Ross, 79 Cal. 159, 21 P. 547 (1889). "[T]he State may acquire or authorize others to acquire title . . . for public use in the . . . [manner] provided by law." CAL. GOV'T CODE § 184.

[20] As originally enacted, in 1872, the section read: "Before property can

tion of compatibility to certain public sector condemnors—such as the legislative bodies of cities or counties—respecting property located within their borders.[21] The effect of section 1241(2) as amended is to make the determination by the official body in question conclusive on the issue of the compatibility of the location.[22] The precondition of compatibility, therefore, has been nullified as applied to virtually all condemnors of a strictly public sector character.

The Private Individual As Condemnor

As above stated,[23] the legislature has delegated the state's power of eminent domain to private individuals as well as to public agencies. According to the current state of the law, if lack of compatibility is alleged by the property owner, this is treated as an affirmative defense with the burden of proof on the property owner.[24] No statutory presumptions of compatibility are awarded the private condemnor.[25]

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be taken, it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

[21] California Code of Civil Procedure section 1241(2), as amended by Cal. Stats. 1913, ch. 293, § 1, at 549, reads as follows: "[Before property can be taken, it must appear] 2. That the taking is necessary to such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; [*sic*] (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof."

Ensuing amendments to section 1241(2) expanded the class of condemnors afforded the conclusive presumption thereby as follows: Cal. Stats. 1935, ch. 254, § 1, at 930, added sanitary districts, irrigation districts, public utility districts, and water districts. Cal. Stats. 1949, ch. 802, § 1, at 1539, added school districts. Cal. Stats. 1955, ch. 1036, § 3, at 1987, added transit districts. Finally, Cal. Stats. 1957, ch. 1616, § 1, at 2961, added rapid transit districts.

[22] People v. Chevalier, 52 Cal. 2d 299, 304-06, 340 P.2d 598, 601-02 (1959); Anaheim Union High School Dist. v. Vieira, 241 Cal. App. 2d 169, 51 Cal. Rptr. 94 (1966); *see* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 4.11 (rev. 3d ed. 1962).

[23] See text accompanying note 14 *supra.*

[24] See text accompanying notes 60-64 *infra.*

[25] Linggi v. Garovotti, 45 Cal. 2d 20, 27, 286 P.2d 15, 20 (1955).

Nor, as was shown by the Supreme Court of California in *Linggi v. Garovotti*,[26] has the judiciary seen fit to afford any such presumption to the condemning *private individual.*

Linggi involved a condemnation proceeding brought by a private individual seeking to appropriate neighboring land for the purpose of constructing a sewer for his apartment house. Strictly speaking, compatibility was not an issue in the proceeding because the property owner elected to defend by alleging lack of *necessity* for the condemnation. However, the court did have occasion to mention compatibility, and the decision is illustrative of the attitude of the supreme court toward private sector condemnors in general. The onus placed upon such condemnors by the court was expressed as follows:

> Upon a trial of the action, it will be necessary for Linggi [the condemnor] to prove, by a preponderance of the evidence, his right and justification for the proposed condemnation. A somewhat stronger showing of those requirements is necessary than if the condemnor were a public or quasi-public entity. Linggi will not have the benefit of the conclusive presumption ". . . that such proposed . . . public improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury." . . . He might be denied the easement which he is endeavoring to obtain if other [*sic*] remedy is available to him which would be less injurious to private property.[27]

Linggi thus stands for the propositions that, in the case of a condemnation proceeding brought by a private individual, no presumption of compatibility, conclusive or otherwise, will be afforded the condemnor, and that the private condemnor must prove his "right and justification" for the proposed condemnation. The case is also important, from the standpoint of this comment,[28] as a clear example of recognition by the supreme court of a public sector-private sector dichotomy in condemnation proceedings.

It would seem, furthermore, based upon *Linggi*, that in the case of a condemnation action brought by a private *individual*, the courts will effectuate the pre-condition of compatibility as well as that of necessity. In this specific situation, therefore, it would appear that the pre-condition of compatibility is in fact genuine and not illusory.

Condemnation and the Utility Condemnor: Statutory Picture

When utilities seek to condemn, as with other private corporations, they must satisfy both the pre-conditions imposed by the constitution and the requirements of necessity and compatibility imposed by the legislature.[29] In contrast to public sector condemnors, no presumptions bearing on these requirements have been created *by the*

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[26] *Id.*

[27] *Id.*

[28] See text accompanying notes 82-85 *infra*, where there is a discussion of the "legitimate" and the "illegitimate" progeny of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891).

[29] See text accompanying notes 4-10 *supra.*

legislature for the benefit of the corporate utility condemnor.[30] Thus, although empowered to exercise the right of eminent domain, the utility condemnor is required by statute to exercise it only "in the manner which will be most compatible with the greatest public good and the least private injury."[31]

In addition to imposing the requirements of necessity and compatibility, the legislature also has limited by section 1001 of the Public Utilities Act, at least in theory, the power of the public utility to condemn. This section provides:

> No [public utility corporation] shall begin the construction of . . . a line, plant, *or system,* or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.[32]

The second paragraph of this section, however, excepts therefrom "an extension within or to territory already served by" the corporation.[33] Therefore, the section, to the extent that it purports to operate as a limitation upon the exercise of the power of eminent domain by the public utility, is in effect nullified by paragraph two thereof. This is due to the fact that "territory already served by" the corporation may amount to as much as one-half or two-thirds of the state.[34]

Looking at the compatibility requirement strictly from the standpoint of the legislative enactments, then, it appears that a relatively even balance has been struck between the rights of the property owner and the property and easement requirements of the utilities. The utility's side of the scale is occupied by the delegated power of eminent domain. This is counterbalanced by the property owner's two weights: the requirements of necessity and of compatibility. The question remains concerning the role of the courts in the maintenance, or tipping, of this statutory balance. Curiously, a case[35] involving condemnation by a *public* sector condemnor has become the cornerstone of the California rule that determines the compatibility require-

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[30] CAL. CODE CIV. PROC. § 1241(2); *cf.* Linggi v. Garovotti, 45 Cal. 2d 20, 27, 286 P.2d 15, 20 (1955).

[31] CAL. CODE CIV. PROC. § 1242.

[32] CAL. PUB. UTIL. CODE § 1001.

[33] San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 479, 14 Cal. Rptr. 899, 903 (1961). Insofar as pertinent, paragraph two of Public Utilities Code section 1001 reads as follows: "This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business."

[34] *E.g.*, the Pacific Gas and Electric Company and the Pacific Telephone and Telegraph Company.

[35] Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891).

ment for corporate utility condemnors. This case, therefore, is the starting point.

Judicial Decision and the Requirement of Compatibility

Pasadena v. Stimson

Stimson was a condemnation proceeding brought under Code of Civil Procedure section 1237 *et seq.* (hereinafter referred to as the Eminent Domain Act) by the City of Pasadena to condemn a right of way for an outfall sewer. The proceeding was against owners of land located outside the Pasadena city limits. The defendants moved for a nonsuit on the ground, *inter alia*, that the City had failed to show that the location selected met the compatibility requirement of Code of Civil Procedure section 1242. The Supreme Court of California held that "[w]e do not think a failure to prove that the location of the sewer was most compatible with the greatest public good and least private injury was ground for a nonsuit."[36] The court elected to use this opportunity to set forth some principles of condemnation law, together with some cogent reasons therefor:

> The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. (Code Civ. Proc., sec. 1242.) Exercising, as they do, a *public* function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be *presumed correct and lawful*. . . . [F]or certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the *proof of such damage should come from them*. And we think that when an attempt is made to show that the location made is unnecessarily injurious, *the proof ought to be clear and convincing*; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because whatever location was proposed, it could be defeated by showing another just as good.[37]

The above language postulates three principles of condemnation law concerning the requirement of compatibility. First, as it has power to do,[38] the court established a presumption (albeit anomalous[39]) that the selection of a location by "[t]he state, or its agents in charge of a public use should . . . be presumed correct and lawful."[40]

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[36] *Id.* at 255, 27 P. at 608.

[37] *Id.* at 255-56, 27 P. at 608 (emphasis added).

[38] The California Supreme Court's power to create presumptions is explicitly recognized by the California Evidence Code. Section 600 states that "[a] presumption is an assumption of fact that the law requires to be made . . . ." Section 160 states that "'[l]aw' includes . . . decisional law." *See* B. WITKIN, CALIFORNIA EVIDENCE § 600 (2d ed. 1966).

[39] See text accompanying notes 93-102 *infra*.

[40] Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604, 608 (1891).

Secondly, the court said that if the location selected is unduly injurious to the property owners involved, "the proof of such damage should come from them"[41]—that is, the burden of proof as to improper location is on the property owner. Thirdly, the court established the principle that the "proof ought to be clear and convincing."[42]

Before discussing the impact of the *Stimson* decision upon public utility condemnation law, several important aspects of the case should be noted. First, the condemning agency involved was a *city*; that is, the condemnation proceeding was strictly a public sector situation. Secondly, the appeal was based upon the denial of the defendant-condemnee's motion for a nonsuit.[43] In the case of a motion for a nonsuit on the part of the defendant, it is well established that every legitimate inference must be given the plaintiff's case.[44] The importance of this fact is that it tends to weaken the holding of the case as authority, since the decision was not based upon the merits but upon the denial of a motion for a nonsuit. Therefore, the plaintiff's case was given "every legitimate inference."

Lastly, it should be noted that the legislature has recognized and codified the basic theory behind the *Stimson* decision—that is, the theory that *public* agencies should be presumed to act with the welfare of the public in mind. This was done when the legislature elected to amend Code of Civil Procedure section 1241(2), giving a conclusive presumption of compatibility to certain public agencies.[45] As noted,

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 246, 27 P. at 605.

[44] Leonard v. Watsonville Community Hosp., 47 Cal. 2d 509, 514-15, 305 P.2d 36, 39 (1956); Jefferson v. Hewitt, 103 Cal. 624, 627-28, 37 P. 638, 638-39 (1894). As was said in Leonard v. Watsonville Community Hosp., *supra* at 514-15, 305 P.2d at 39, "[i]t has long been the rule in this state that a nonsuit may be granted only when, disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the court properly determines that there is no substantial evidence to support a verdict in favor of the plaintiff."

[45] Cal. Stats. 1913, ch. 293, § 1, at 549 (with respect to property located within the borders of the agency in question). The *Stimson* case involved the condemnation of property located outside the boundaries of the city involved. Thus the situation there would have fallen outside the purview of section 1241(2) had it then been enacted. However, the *Stimson* case was a sewer line condemnation proceeding. Legislative recognition of the public agency aspect of the *Stimson* doctrine is shown by the fact that a conclusive presumption of compatibility is elsewhere statutorily afforded condemning *cities* with respect to extraterritorial sewer line condemnation proceedings. California Government Code section 39792 provides that "[f]or the purpose of constructing, equipping, using, maintaining, or operating any facility, the city may acquire by . . . condemnation . . . any land, rights of way . . . or any other necessary property, *within or without* the city or the county where the city is located." (Emphasis added). Further, it is provided by California Government Code section 39040 that "[w]hen the public interest or conven-

the legislature amended this statute in 1935, in 1949, in 1955, and again in 1957.[46] In each case the class of condemnors afforded the conclusive presumption was expanded—to include additional *public* agencies. In addition to cities and counties, for instance, the class now includes such agencies as school districts, water districts, and rapid transit districts. The significance of these enactments is that in no case has the legislature seen fit to extend the *Stimson* doctrine to representatives of the *private* sector, although repeatedly presented with opportunities to do so. In particular, although public utility *districts* were added to the class of condemnors afforded the conclusive presumption in 1935, in no instance has the legislature seen fit to afford any presumption, conclusive, rebuttable, or otherwise, to public utility corporations per se. The fact is, the legislative intent clearly appears to have been to *limit* the holders of the presumption of compatibility to those enumerated by the legislature. And, the line has been drawn at agencies responsible, in one way or another, to the electorate.

Subsequent Judicial Applications of the Stimson Doctrine

The Presumption of Compatibility

The presumption of compatibility awarded the condemning city by the court in the *Stimson* decision has found acceptance in the case law of the intermediate California appellate courts with respect to proceedings brought by representatives of both the public and private sectors. Public sector[47] decisions citing *Stimson* as controlling include *Hawthorne v. Peebles*,[48] *Los Altos School District v. Watson*,[49] *Montebello Unified School District v. Keay*,[50] and *Housing Authority v.*

ience requires, a city legislative body may order the acquisition by condemnation or purchase of all property, easements, and rights of way, necessary or convenient for the construction of sewers and drains for sanitary or drainage purposes." Finally, it is provided in California Government Code section 39140 that "[p]roceedings in the condemnation action shall be had pursuant to Article 5, Chapter 7, Part 2, Division 3, except that the ordinance of intention and the ordinance ordering the improvement shall also be *conclusive evidence* in the action that the location of the proposed improvement is that *most compatible with the greatest public good and the least private injury.*" (Emphasis added). It is thus seen that, insofar as cities are concerned, the legislature has codified the *Stimson* decision with respect to condemnation proceedings against property both inside and outside of the city limits.

[46] See note 21 *supra.*

[47] It is apparent that in each of the cases cited in the text accompanying notes 48-51 *infra* the condemning body consisted of a political entity, responsible directly or indirectly to an electorate. Furthermore, with exception to the *Housing Authority* case, each of the condemning bodies involved is at the present time given a conclusive presumption of compatibility. CAL. CODE CIV. PROC. § 1241(2).

[48] 166 Cal. App. 2d 758, 333 P.2d 442 (1959).

[49] 133 Cal. App. 2d 447, 284 P.2d 513 (1955).

[50] 55 Cal. App. 2d 839, 131 P.2d 384 (1942).

Forbes.[51] In all of these cases, *Stimson* is cited as authority for the proposition that the act of the condemning agency in question "in selecting the particular site herein sought 'should, in the absence of evidence to the contrary, be presumed correct and lawful.' "[52]

Although denied to a private individual condemnor by the Supreme Court of California,[53] the *Stimson* presumption of compatibility has been extended to other members of the private sector—public utilities—by the California Courts of Appeal in two cases: *Tuolumne Water Power Company v. Frederick*[54] and *San Diego Gas and Electric Company v. Lux Land Company*.[55]

In *Tuolumne Water*, the power company brought an action to condemn a right of way over the defendant's lands for an electric power line. On appeal, the condemnee took exception to the trial court's instruction, which, following *Stimson*, placed the burden of proof on the issue of compatibility upon the property owner.[56] Since the *Stimson* presumption of compatibility was not mentioned in the specific instruction to which exception was taken, discussion of it was not necessary to the decision. Irrespective of this fact, the court elected to extend the *Stimson* presumption of compatibility to a public utility corporation. Specifically, quoting from *Stimson*, the court said that a location proposed by a public utility condemnor " 'should, in the absence of evidence to the contrary, be presumed correct and lawful. . . . [F]or certainly it must be presumed that the state or its agent has made the best choice for the public . . . .' "[57]

Fifty-one years later, in *San Diego Gas*, the *Stimson* presumption was again extended to a public utility condemnor by the California Court of Appeal. And again, the court, in upholding judgment for the condemnor, quoted from *Stimson*[58] to overrule the defendant's contention that there had been insufficient showing of compatibility to comply with Code of Civil Procedure section 1242. The net result of these two decisions is to afford to the executives (or engineers) of the

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[51] 51 Cal. App. 2d 1, 6-9, 124 P.2d 194, 197-99 (1942).

[52] Montebello Unified School Dist. v. Keay, 55 Cal. App. 2d 839, 843, 131 P.2d 384, 387 (1942), *quoting from* Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604, 608 (1891).

[53] Linggi v. Garovotti, 45 Cal. 2d 20, 27, 286 P.2d 15, 20 (1955).

[54] 13 Cal. App. 498, 110 P. 134 (1910).

[55] 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (1961). Furthermore, the law upon this point apparently is looked upon by secondary authority as settled. *See, e.g.*, 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 411[4] (rev. 3d ed. 1962); Sparrow, *Public Use and Necessity* § 8.53, in CALIFORNIA CONDEMNATION PRACTICE (Cal. Cont. Educ. Bar 1960).

[56] Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910). The instruction complained of is set forth verbatim in the text accompanying note 69 *infra*.

[57] Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910).

[58] San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 477-78, 14 Cal. Rptr. 899, 902 (1961).

utility a *judicially* created presumption that the location they have selected for their proposed facility satisfies the statutory compatibility requirement.

Burden of Proof: On the Property Owner

The rule in California dealing with the issue of compatibility is that the burden of proof is on the condemnee. This rule is descendant from two separate and diverse lines of reasoning and authority. First, as established in *Stimson*, if lack of compatibility is put in issue the state or its agent should be presumed to have made the best choice for the public.[59] This public agency-public responsibility rationale of *Stimson* has been applied in an unbroken line of condemnation proceedings brought by both public agencies[60] and public utility condemnors.[61]

A second rationale the courts have used to justify placing the burden of proof on the property owner is derived from the rules of pleading and proof. In condemnation proceedings, it is held that the complainant need not plead compliance with Code of Civil Procedure section 1242 in order to state a cause of action.[62] If the complaint is silent on the issue of compatibility, and the defendant does not assert affirmatively a failure to satisfy this requirement, no issue of compatibility is presented.[63] Therefore, if the compatibility of the location is to be put in issue, it must be pleaded affirmatively by the property owner. Since the rule is settled in California that the burden of proof follows the burden of pleading,[64] the burden thus falls upon the property owner to prove that the proposed location fails to meet the compatibility requirement.

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[59] Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604, 608 (1891).

[60] *See, e.g.*, Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447, 284 P.2d 513 (1955); Montebello Unified School Dist. v. Keay, 55 Cal. App. 2d 839, 131 P.2d 384 (1942); Housing Authority v. Forbes, 51 Cal. App. 2d 1, 124 P.2d 194 (1942). *See also* Sparrow, *Public Use and Necessity* § 8.56, in CALIFORNIA CONDEMNATION PRACTICE (Cal. Cont. Educ. Bar 1960).

[61] San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (1961); Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910).

[62] San Francisco & S.J.V. Ry. v. Leviston, 134 Cal. 412, 66 P. 473 (1910); Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447, 284 P.2d 513 (1955); Montebello Unified School Dist. v. Keay, 55 Cal. App. 2d 839, 131 P.2d 384 (1942); People v. Marblehead Land Co., 82 Cal. App. 289, 255 P. 553 (1927); Vallejo & N. Ry. v. Home Sav. Bank, 24 Cal. App. 166, 168-69, 140 P. 974, 975 (1914); *see* Sparrow, *Public Use and Necessity* § 8.56, in CALIFORNIA CONDEMNATION PRACTICE (Cal. Cont. Educ. Bar 1960).

[63] Montebello Unified School Dist. v. Keay, 55 Cal. App. 2d 839, 841, 131 P.2d 384, 386 (1942).

[64] "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." CAL. EVIDENCE CODE § 500. In B. WITKIN, CALIFORNIA EVIDENCE § 197 (2d ed. 1966), it is said: "Ev. C. § 500 is

Burden of Proof: Clear and Convincing Evidence

As a general rule, in civil cases the "burden of proof" requires proof "by a preponderance of the evidence."[65] However, a greater or lesser burden may be imposed by statute or judicial decision.[66] According to the *Stimson* doctrine, not only does the condemnee have the burden of proof on the issue of compatibility, but the condemnee's proof must be *clear and convincing.*[67] The great weight of this burden was emphasized in the California Supreme Court's definition of the phrase "clear and convincing proof"—proof " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' "[68] *Tuolumne Water* extended the *Stimson* "clear and convincing" evidence rule to the benefit of a condemning public utility. The court there stated:

> Complaint is made that the court instructed the jury to the effect that the plaintiff under the law has the right to construct its line in the manner and place it deems best, provided it uses the most available route, and provided that the location is made in a manner most compatible with the greatest public good and the least private injury; and that in case it is claimed that the plaintiff has not so located its line, the proof must be *clear and convincing.* In our opinion the rule is correctly stated in the instruction. It is in almost the identical language used by the Chief Justice in *City of Pasadena v. Stimson* . . . .[69]

Present State of the Law

With respect to the compatibility requirement, the current California law, as delineated by the intermediate appellate courts, is as follows. First, there is a statute which states that land selected for condemnation "must be located in the manner which will be most compatible with the greatest public good and the least private injury."[70] Secondly, in the case of most public sector condemnors, the requirement of compatibility is conclusively presumed.[71] Thirdly, the California Supreme Court has held that in the case of a private

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an expanded version of the basic rule that the burden of proof follows the burden of pleading.

"Where, under the substantive law, the fact is essential to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on him.

"Where, under the substantive law, the fact is essential to a defense raised by the defendant, the burden of proof of that fact is on him." (Cited authorities omitted). *See also id.* § 196.

[65] CAL. EVIDENCE CODE § 115.

[66] B. WITKIN, CALIFORNIA EVIDENCE § 208 (2d ed. 1966).

[67] Pasadena v. Stimson, 91 Cal. 238, 256, 27 P. 604, 608 (1891).

[68] Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544 (1899); *accord, In re* Jost, 117 Cal. App. 2d 379, 383, 256 P.2d 71, 74 (1953); *see* B. WITKIN, CALIFORNIA EVIDENCE § 209 (2d ed. 1966).

[69] Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910) (emphasis added).

[70] CAL. CODE CIV. PROC. § 1242.

[71] CAL. CODE CIV. PROC. § 1241(2).

condemnor, the condemnor must show his "right and justification for the proposed condemnation," and "[a] somewhat stronger showing of those requirements is necessary than if the condemnor were a public or quasi-public entity."[72] Fourthly, the California Courts of Appeal, following an 1891 decision having nothing to do with public utilities, have created a presumption that the acts of public utility executives (and engineers) in selecting land for a proposed facility are to be "presumed correct and lawful."[73] Fifthly, these courts have, in addition to the creation of this presumption, ruled consistently that the burden of proof on the issue of compatibility is on the property owner.[74] Finally, regardless of whether a condemnation proceeding is initiated by either a public utility corporation or a governmental agency, *clear and convincing* evidence is required for the sustention of this burden of proof.[75]

Arguments for and Against the Stimson Doctrine as Extended to Public Utility Condemnors

Arguments in Favor of the Extension

As discussed above,[76] the statutory language that property selected by a public utility must be "located in the manner which will be most compatible with the greatest public good and the least private injury,"[77] has been nullified by the California Courts of Appeal.[78] The net result of this judicial debilitation of the statutory compatibility requirement is an elevation of the needs of the utility corporations to a higher plane than the conflicting rights of the owner of the property that the utility seeks to condemn.

Arguments can be advanced in defense of this elevation. The court in the *Stimson* case based its holding partially upon the fact that public improvements necessarily must be located somewhere, and unless a condemnor is given the benefit of the doubt in the matter

> . . . no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because whatever location was proposed, it could be defeated by showing another just as good.[79]

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72 Linggi v. Garovotti, 45 Cal. 2d 20, 27, 286 P.2d 15, 20 (1955).

73 San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 477-78, 14 Cal. Rptr. 899, 902 (1961); Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910).

74 See text accompanying notes 59-64 *supra*.

75 Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910).

76 See text accompanying notes 47-75 *supra*.

77 CAL. CODE CIV. PROC. § 1242.

78 San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (1961); Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910).

79 Pasadena v. Stimson, 91 Cal. 238, 256, 27 P. 604, 608 (1891).

The force of this argument was recognized and applied by the California Courts of Appeal in the *Tuolumne Water* and *San Diego Gas* decisions. As is the case with the maintenance of adequate city sewage facilities, the provision of adequate power, heat, and water services are civic necessities. Private property is going to have to be acquired, by condemnation or otherwise, simply because transmission lines and other facilities must be located somewhere if these essential services are to be provided. This fact is the ultimate justification for judicial extension of the *Stimson* doctrine to the benefit of utility corporations.

Another forceful argument in favor of the extension of the doctrine can be made. If the property owner's burden of proof on the issue of alleged incompatibility were eased, each individual owning land coincident with the proposed location of the utility facility, or transmission line, would be placed in a position to exact tribute.[80] And the burden of this tribute, if exacted, would fall upon the public, as well as upon the utility, in the form of higher rates.

Finally, there is the simple point that someone must ultimately decide where the utility facilities shall be located. One factor that must be considered is that of public interest. This, in most cases, simply involves the selection of the most economic route for the utility. This factor, however, must be balanced against the factor of private injury, which, although bound to strike somewhere *regardless* of the route selected, is compensable in any event. The problem reduces itself to the question of whether the determination of the compatibility of the location is to be made by the judiciary or by experts in the field employed by the utility corporation. Is the judiciary equipped to perform such a function? Under the *Stimson-Tuolumne Water* doctrine, which in effect makes the utility's selection of a location virtually conclusive except in a clear case of abuse,[81] the courts have tacitly admitted that they are not so equipped and have abandoned the field to the utility engineers.

Arguments Against the Extension

Legitimate and Illegitimate Progeny of the Stimson Case

A number of arguments may be offered in opposition to the judicial extension of *Stimson*. First is the simple fact that the *Stimson* case involved a condemnation proceeding initiated by the legislative

[80] The primary interest of the typical landowner-condemnee is in the obtainment of as high a *compensation* as possible for the taking. Usually, this compensation will be determined on the basis of an out-of-court settlement with the condemnor. To ease the condemnee's burden of proof on the issue of compatibility would naturally place him in an immensely stronger bargaining position in pre-settlement negotiations. Consequently, he would be able to obtain much higher rates of settlement—"tribute" which he would be in the position to exact for the use of his land.

[81] See text accompanying notes 70-75 *supra*.

body of a city. Such a body is elected by and responsible to the people in a direct fashion. In contrast to the executives and engineers of a corporate public utility, there is a well-rooted presumption in the California law that public officers will carry out their functions and exercise their powers in accordance with the law.[82]

Cases involving condemnation proceedings brought by a member of the public sector—such as a school district, or a municipal housing authority—are doubtless legitimate offspring of the *Stimson* decision. This is because they are based upon the same principle upon which *Stimson* itself was based, *i.e.*, the public responsibility of *public* agencies.

Tuolumne Water and *San Diego Gas*, however, extended the benefit of the *Stimson* doctrine to members of the *private* sector. It may be argued forcefully, therefore, that these cases are illegitimate progeny of the *Stimson* decision since they fail to recognize the fundamental principle upon which *Stimson* was based. An entity whose primary responsibility is to its own stockholders cannot be presumed to have the same notions of the public good as one that is directly responsible to the public whose interest is being affected. In selecting a location for a line of high tension transmission towers, for instance, an electric company has no concern, or at least will not be primarily concerned, with the blighting effects its towers and lines may have on the communities through which they are to run. In contrast to governmental agencies, it is doubtful that any private corporations exist whose primary object is to promote the public good.[83] As was said by one New Jersey court, " '*private corporations whose sole object it is, to promote the public good . . . are not to be found. Private interest or emolument, is the primum mobile in all. The public interest is secondary and consequential.*' "[84] That which is good for the Tuolumne Water Power Company, therefore, is not necessarily that which is good for the country.

Moreover, public utilities, although executers of essential public functions, are not in the same public sector category as governmental agencies, such as those typified by the condemnors in the above discussed *legitimate* progeny of the *Stimson* decision.[85] The *Stimson*

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[82] People v. Glove Grain & Milling Co., 211 Cal. 121, 294 P. 3 (1930); Housing Authority v. Forbes, 51 Cal. App. 2d 1, 124 P.2d 194 (1942); *see* CAL. EVIDENCE CODE § 664 ("It is presumed that official duty has been regularly performed.").

[83] Fortenberry, *Exercise of Eminent Domain by Private Bodies for Public Purpose*, 1966 U. ILL. L.F. 131, 133.

[84] Texas Pipe Line Co. v. Snelbaker, 30 N.J. Super. 171, 177, 103 A.2d 634, 638 (Super. Ct. 1954) (emphasis by the court), *quoting from* Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 726-27 (Chancery 1832).

[85] In addition to its obvious character, this distinction has received statutory recognition. It is explicitly provided that where property has been appropriated "by any individual, firm, or private corporation" to some public use, and the same property is needed by a *public agency* for a public use, the

doctrine was originally formulated to expedite condemnation proceedings brought by a governmental body. The fact that utilities are essentially members of the *private* sector is the ultimate objection to the extension of the *Stimson* doctrine to the corporate utility condemnor.

The Doctrine of Delegation

Certain rules of statutory construction supply additional arguments against the extension of the *Stimson* doctrine to the utility condemnor. It is fundamental that statutes for the condemnation of land are in derogation of general rights and of common law modes of procedure, and must be strictly construed.[86] According to the doctrine of delegation, eminent domain is an inherent power of the sovereign, which, when delegated, can be exercised only in strict accordance with explicit legislative authorization.[87] California Code of Civil Procedure section 1237 expressly limits the exercise of the power of eminent domain to "the manner provided in this title." As stated by one court:

> A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.[88]

Therefore, it well may be argued that when the legislature delegated the power of eminent domain to members of the private sector it had no intent to afford those members any presumption concerning

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latter use "shall be deemed a more necessary use to which such property has been appropriated." CAL. CODE CIV. PROC. § 1241(3); *see* People *ex rel.* Public Util. Comm'r v. Fresno, 254 Cal. App. 2d 76, 81-82, 62 Cal. Rptr. 79, 82-83 (1967), where it is said: "Under Code of Civil Procedure section 1240, it is clear that a city may, by condemnation, take property already appropriated to a public use if the public use to which it is to be applied is a more necessary public use. Moreover, under Code of Civil Procedure section 1241 a city is expressly authorized to condemn property belonging to a *public utility* already dedicated to a public use. In addition, the proposed *city use* is deemed a 'more necessary public use' as a matter of law." (Emphasis added).

[86] San Francisco & Alameda Water Co. v. Alameda Water Co., 36 Cal. 639 (1869); Gilmer v. Lime Point, 19 Cal. 47 (1861).

[87] People v. Superior Court, 10 Cal. 2d 288, 73 P.2d 1221 (1937); Ventura County v. Thomson, 51 Cal. 577 (1877); Los Angeles v. Hall, 103 Cal. App. 460, 284 P. 707 (1930); *see* McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615 (1905); San Francisco & Alameda Water Co. v. Alameda Water Co., 36 Cal. 629 (1869); Stanford v. Worn, 27 Cal. 171 (1865); Curran v. Shattuck, 24 Cal. 427 (1864). *See also* Delaware L. & W.R.R. v. Morristown, 276 U.S. 182 (1928); Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859), where it was held that he who relies for title on the power of the state to condemn, and not on the will of the owner, must show strict compliance with those statutory rules from which his title accrues.

[88] Los Angeles v. Koyer, 48 Cal. App. 720, 725, 192 P. 301, 303 (1920), *quoting from* 10 RULING CASE LAW 196.

compatibility. Further, although the burden of proof concerning noncompatibility is on the property owner, in no instance has the legislature manifested any intent that this burden should require a sustention by "clear and convincing" evidence.

Thus, based upon the doctrine of strict construction, it is possible to conclude that the California Courts of Appeal overstepped their bounds in electing to extend the rule of the *Stimson* case to members of the private sector. This conclusion follows from the fact that the statute that delegates the state's power of eminent domain to members of the private sector[89] is limited by another statute that quite clearly pre-conditions the exercise of this power. This limiting statute states succinctly and unequivocally that the property to be condemned must be located "in the manner which will be most compatible with the greatest public good and the least private injury."[90] Legislative intent to abrogate this requirement, respecting its application to the corporate utility condemnor, is not discernible from an examination of the enactments on the subject.

Presumptions: The Manifested Legislative Intent

A further objection to the extension of the *Stimson* doctrine to utility corporations can be based upon the *manifested* legislative intent regarding presumptions of compatibility. It clearly may be argued that the legislature has expressed an intent on this issue by its decision to limit holders of presumptions of compatibility to governmental agencies such as those enumerated in Code of Civil Procedure section 1241(2).[91]

No statute authorizes the courts to expand this class. Code of Civil Procedure section 1858 provides that in the construction of a statute the function of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted. The function of the court is not to rewrite the law so as to make it conform to a presumed intent not expressed therein.[92] Based upon a simple reading of the Eminent Domain Act, minus the judicial gloss, it is quite apparent that the legislative intent was to limit holders of conclusive presumptions of compatibility to governmental agencies that are responsible, directly or indirectly, to the electorate. If this interpretation of the legislative intent is correct, then the California Courts of Appeal are in error. In effect, they have ignored the mandate of Code of Civil Procedure section 1242 in awarding a virtually insurmountable presumption-burden of proof combination to corporate utility condemnors respecting the requirement of compatibility.

89 CAL. CIV. CODE § 1001.

90 CAL. CODE CIV. PROC. § 1242.

91 Said governmental agencies are listed in note 21 *supra*.

92 Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365, 5 P.2d 882, 884 (1931); People v. White, 122 Cal. App. 2d 551, 554, 265 P.2d 115, 117 (1954).

The Anomalous Nature of the Stimson Presumption

A further argument that can be used effectively against the *Stimson* doctrine results from the nature of the *Stimson* presumption itself. The *Stimson* case established a presumption that the acts of the condemnor in selecting land for condemnation should be presumed to be "correct and lawful," *i.e.*, in accord with the requirement of compatibility.[93] Yet, as above noted,[94] the party against whom the presumption operates already has the burden of proof with respect to this issue. A genuine presumption operates in favor of one upon whom the burden of proof is placed.[95] Its function is to shift the burden of proof to the party against whom the presumption operates.[96] A presumption operating against the party having the burden of proof serves no function, and is, therefore, anomalous.[97] Such a presumption is redundant, since it merely restates the already existing burden of proof on the given issue.[98]

Such a presumption is valueless and illogical. It has been characterized as "like a handkerchief thrown over something covered by a blanket,"[99] so wholly overshadowed by the burden of proof as to be without practical effect.[100] As stated by Chief Justice Traynor:

> [I]t is clear that a rebuttable presumption is only a procedural device to aid the party with the burden of proof. It would be *meaningless* if applied against him because he already has the greater burden of introducing sufficient evidence to prove the existence of the facts by the preponderance of the probabilities.[101]

This viewpoint of Chief Justice Traynor has apparently been adopted by the California Evidence Code. As stated in the official comment to Evidence Code section 606:

> If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given.

It is thus predictable that the policy of awarding this anomalous presumption of compatibility to a condemning utility will be re-

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93 See text accompanying notes 47-58 *supra.*

94 See text accompanying notes 59-64 *supra.*

95 Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71, 82 (1940).

96 CAL. EVIDENCE CODE § 606.

97 Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71, 82 (1940); *see* 60 MICH. L. REV. 510, 511 (1962).

98 60 MICH. L. REV. 510, 511 (1962).

99 Brown v. Henderson, 285 Mass. 192, 196, 189 N.E. 41, 43 (1934) (concurring opinion).

100 60 MICH. L. REV. 510, 511 (1962); *see* Board of Water Comm'rs v. Robbins, 82 Conn. 623, 640, 74 A. 938, 945 (1910).

101 Speck v. Sparver, 20 Cal. 2d 585, 593, 128 P.2d 16, 20 (1942) (dissenting opinion) (emphasis added); *accord*, Scott v. Burke, 39 Cal. 2d 388, 402, 247 P.2d 313, 321 (1952) (dissenting opinion).

examined upon a presentation of a proper case to the Supreme Court of California.[102]

The Illogicality of the Clear and Convincing Requirement

The policy requiring the property owner to demonstrate lack of compatibility by "clear and convincing" evidence is susceptible to serious question. The *San Diego Gas* case stands as recent authority for extension of the anomalous *Stimson* presumption to utilities, and also for placing the burden of proof on the condemnee.[103] It is significant to note, however, that this latter case, although it quoted *Stimson* with approval, quoted only part of the *Stimson* rule.[104] Omitted was the sentence imposing the extraordinary burden of "clear and convincing" evidence upon the property owner, despite the existing precedence of *Tuolumne Water*[105] for the imposition of such a burden.

Upon analysis, the illogicality of imposing such an extraordinary burden upon the property owner is evident. This illogicality is demonstrated by the fact that the clear and convincing evidence rule gives the public utility condemnor a greater advantage over a contesting property owner than is afforded to some *public* agencies.

For example, California Public Resources Code section 5006.1 provides that the declaration of the Director of Parks and Recreation shall be prima facie evidence of compatability.[106] And, according to the Evidence Code, "[a] statute providing that a fact or group of facts is

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[102] A conclusive presumption of compatibility, such as that afforded condemning public agencies in California Code of Civil Procedure section 1241(2), also operates against the party having the burden of proof on the issue. Such a presumption, however, cannot be classified as anomalous, since rather than a mere procedural device, a conclusive presumption is the equivalent of a substantive rule of law. *See* 9 J. WIGMORE, EVIDENCE § 2492 (3d ed. 1940). Being in effect a substantive rule of law, such a presumption, rather than merely shifting the burden of proof on the given issue, operates to obliterate it entirely, since if the presumption applies, compatibility is no longer an issue in the proceeding.

[103] San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 477-78, 14 Cal. Rptr. 899, 902 (1961).

[104] *Id.* Quoting from Pasadena v. Stimson, 91 Cal. 238, 255, 27 P. 604, 608 (1891), the court said: "'. . . [I]t must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damages should come from them.'" In *Stimson*, the court *went on* to say: "[W]e think that when an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing . . . ." Pasadena v. Stimson, *supra.*

[105] Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 P. 134, 137 (1910).

[106] "The declaration of the director shall be prima facie evidence . . . [t]hat such proposed acquisition is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." CAL. PUB. RESOURCES CODE § 5006.1.

prima facie evidence of another fact establishes a rebuttable presumption."[107] As clearly can be inferred from the court's holding in *People v. Van Gorden*,[108] clear and convincing evidence is not required to rebut this presumption. *Van Gorden* involved a proceeding to condemn land for park purposes pursuant to Public Resources Code section 5006.1. As was said by the court, the Director's resolution "suffices for proof of a particular fact until contradicted and overcome . . . by other evidence, direct or indirect."[109] In other words, the legislature has provided that the prima facie case established by an appointed public official's resolution of compatibility may be overcome by a mere preponderance of the evidence.[110] Contrast this with the presumption-burden of proof combination given by the judiciary to the operating executives of a utility corporation—a combination which can only be overcome by *clear and convincing* evidence.[111]

The property owner's burden of proving lack of compatibility by clear and convincing evidence may be further contrasted with the property owner's burden of proof in a "public use" controversy. "Public use," as already noted,[112] is a constitutionally justiciable issue in every eminent domain proceeding. However, in a proceeding to condemn land for state highway purposes,[113] it was held that the public use requirement was prima facie established by the Highway Commission's resolution, which created a rebuttable presumption of public use. It was held by the court that this presumption need only be rebutted by a preponderance of the evidence. The court stated:

> In the case at bench we thus have a prima facie case established by plaintiff [Highway Commission] that the taking of the entire par-

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[107] CAL. EVIDENCE CODE § 602.

[108] 226 Cal. App. 2d 634, 38 Cal. Rptr. 265 (1964).

[109] *Id.* at 636-37, 38 Cal. Rptr. at 267, *quoting from* 18 CAL. JUR. 2D *Evidence* § 13 (1954).

[110] It is only necessary to introduce sufficient evidence to rebut the prima facie case established by the director's resolution. No more is required. *See* Frank Meline Co. v. Kleiberger, 108 Cal. App. 60, 62-63, 290 P. 1042, 1043 (1930), where it is said, "It seems settled . . . that a *prima facie* case is that which is received or continues until the contrary is shown. A prima facie case is one which . . . can be overthrown . . . by rebutting evidence adduced on the other side." *See also* Huber v. Scott, 122 Cal. App. 334, 342, 10 P.2d 150, 153 (1932), where it is said, "*Prima facie* evidence is a well-recognized term which infers that it is only controlling in the absence of other evidence which rebuts [it]." *Accord,* Maganini v. Quinn, 99 Cal. App. 2d 1, 8, 221 P.2d 241, 245 (1930); People v. Carmona, 80 Cal. App. 159, 166, 251 P. 315, 318 (1926).

[111] And this disparity is in full view of the fact that in the case of a governmental body, such as the Department of Parks and Recreation, there is an established presumption, noted in text accompanying note 82 *supra*, that public officers will carry out their functions and exercise their powers in accordance with the law.

[112] See text accompanying notes 4-6 *supra*.

[113] People *ex rel.* Department of Pub. Works v. Lagiss, 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

> cel in question was for a public use. It was therefore incumbent upon defendant to overcome this prima facie showing by establishing . . . his affirmative defenses . . . by a *preponderance* of the evidence, the burden of proof as to such defenses being on him.[114]

Contrast, again, this with the presumption-burden of proof combination afforded to utility executives respecting compatibility—one that the condemnee can only overcome with *clear and convincing* evidence.

As is apparent, serious question exists concerning the policy of requiring the property owner to prove noncompatibility by clear and convincing evidence. This policy operates as a de facto judicial nullification of the express compatibility requirement of Code of Civil Procedure section 1242. Legitimate doubt exists as to whether a doctrine based upon a condemnation proceeding by a city, and formulated on the basic assumption of the public responsibility of public agencies,[115] should be extended to the benefit of corporate public utilities. Consequently, it may be expected that this policy of requiring clear and convincing proof from the landowner on the issue of compatibility will also be extensively re-examined upon the presentation of an appropriate case to the Supreme Court of California.

The Illinois Practice

There is one feasible method of solving the problem of striking a balance between the needs of the vast public utilities and the rights of the owners of private property, while still maintaining an element of control over potential abuse. This is for the legislature to condition the exercise of the utility's power to condemn upon the prior approval of another body of a more public character than the utility.[116]

For example, under the Illinois Public Utilities Act, utilities are authorized to exercise the power to condemn, but only when the project requiring condemnation is authorized by the Illinois Commerce Commission.[117] A public utility, having thus acquired the power of eminent domain, is given approved termini between which it may choose the particular parcels of land that will be crossed by the improvement. These termini are usually specified by the certificate of public convenience and necessity that is issued by the state regulatory body.[118] Accordingly, the exercise of the power of eminent domain requires the joint operation of the Illinois Commerce Commission and the petitioning public utility. This joint operation is a necessary pre-condition to the vesting in the utility of the power of eminent domain, and the power to select the route of a facility.[119] Under this

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114 *Id.* at 37, 35 Cal. Rptr. at 563 (emphasis added).

115 Pasadena v. Stimson, 91 Cal. 238, 255-56, 27 P. 604, 608 (1891).

116 Costello, *Challenging the Right to Condemn*, 1966 U. ILL. L.F. 52, 61.

117 ILL. REV. STAT. ch. 111 2/3, §§ 50, 63 (1963).

118 Fortenberry, *Exercise of Eminent Domain by Private Bodies for Public Purpose*, 1966 U. ILL. L.F. 131, 149.

119 Central Ill. Elec. & Gas Co. v. Schully, 17 Ill. 2d 348, 351-52, 161 N.E.

Act, the power to condemn does not even exist in the utility until the Commission issues its certificate, having found that the public convenience and necessity require the facility along the route selected by the utility.[120]

The net effect of the Act is to subject the utility's exercise of the condemnation power to the scrutiny of a regulatory body, while leaving most of the operating decisions in the hands of the utility. The Illinois practice is thus quite distinguishable from the California practice, in which the only practical control of a utility's exercise of the power of eminent domain is wielded by the courts.[121] As discussed above, the courts have, de facto, relinquished this control over the utilities by affording them, respecting compatibility, a presumption *cum* burden of proof package that is merely a scintilla less than conclusive.

Suggested California Procedure

By virtue of Code of Civil Procedure section 1242, the California legislature has delegated the essentially non-judicial function of arbitrating questions of compatibility to the judiciary. Unfortunately, a court is ill-suited to determine whether a hundred-mile line of fifty-foot high transmission towers has been located "in the manner which will be most compatible with the greatest public good and the least private injury."[122] While the judiciary's lack of expertise in this field is apparent, it is also apparent that the problem should not be abandoned to "the eager slide rule of the engineer-architect and the arbitrary decision"[123] of the executives of essentially private corporations. The power of eminent domain is too "fraught with the possibility of abuse"[124] to leave the manner of its exercise to the virtually unfettered discretion of the corporate utility condemnor.

2d 304, 307 (1959); Fortenberry, *Exercise of Eminent Domain by Private Bodies for Public Purpose*, 1966 U. ILL. L.F. 131, 150.

120 *See* Central Ill. Elec. & Gas Co. v. Schully, 17 Ill. 2d 348, 351-52, 161 N.E.2d 304, 307 (1959), where the court states: "We have found that it requires the concurrent action of the petitioning public utility and the Commerce Commission to vest the power of eminent domain and the selection of the route for a power transmission line in the corporate public utility. The necessity for the improvement requiring condemnation and the manner of its construction are for the consideration of the condemnor, subject to the decision of the commission as to convenience and necessity. The condemning petitioner does not have the right of eminent domain until the commission issues its certificate."

121 *See* discussion of California Public Utilities Code section 1001 in text accompanying notes 32-34 *supra*.

122 CAL. CODE CIV. PROC. § 1242.

123 State H'way Comm'n v. Wheeler, 148 Mont. 246, 253, 419 P.2d 492, 496 (1966).

124 Los Angeles v. Koyer, 48 Cal. App. 720, 725, 192 P. 301, 303 (1920), *quoting from* 10 RULING CASE LAW 196.

What is needed in California is a system similar to the Illinois practice. This would require the concurrence of an agency of the public sector as an essential pre-condition to the vesting and exercise of the power of eminent domain by a private corporation. An initial check would thereby be provided on possible abuses of the power by the corporation. And, the property owner would still have an ultimate recourse to the courts, which would need to act only in clear cases of abuse.

The Public Utilities Commission, as constructed by the California Constitution,[125] is both authorized and specially equipped to handle problems such as evaluating the compatibility of locations proposed by utility condemnors for the placement of their facilities. As stated in the California Constitution:

> The [Public Utilities] Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities . . . as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the [Public Utilities] Commission respecting public utilities is hereby declared to be *plenary* and to be unlimited by any provision of this Constitution.[126]

Interpreting this provision, it was stated by one court:

> [I]t will not be questioned that the legislature in the exercise of the power conferred upon it by [the California Constitution] may rightfully invest the [Public Utilities] Commission with plenary power to regulate the manner in which . . . public utilities shall maintain and conduct their business and the essential appliances thereof and that said commission may prescribe such regulations with respect to the carrying on of such utilities as may be necessary to *safeguard and protect any rights of the public which may be affected thereby.*[127]

Thus, California has a constitutionally constructed and authorized public agency with the express function of regulating and exercising control over utility corporations. However, as above noted,[128] the Public Utilities Act, in its present form, exempts utilities from Commission control in the case of construction or extension of company facilities into or to areas already served by them. If this exemption were abolished, it would be necessary for the utility to secure a certificate of public convenience and necessity as a pre-condition to the exercise of the power of eminent domain.[129] The Commission would thus have an opportunity to assess the compatibility of the utility's proposed location prior to the issuance of its certificate. The legislature, having constitutional authority,[130] could readily establish administrative machinery designed to provide the property owner with

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125 CAL. CONST. art. XII, §§ 22, 23.

126 *Id.* § 23 (emphasis added).

127 Morris v. Sierra Power Co., 57 Cal. App. 281, 289, 207 P. 262, 265 (1922) (emphasis added); *accord,* Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119 (1913).

128 See text accompanying notes 32-34 *supra.*

129 The issuance of the certificate would be contingent, *inter alia,* upon the compatibility of the proposed location.

130 See text accompanying notes 125-127 *supra.*

an opportunity to be heard before the Commission, prior to the issuance of the certificate. And, since the exercise of the power to condemn by the utility would thus be preliminarily regulated by a governmental body, it would be reasonable to provide, by statute, that the selection made by the utility would be presumed to comply with the compatibility requirement, and that the presumption could be rebutted only by clear and convincing evidence. The utility would still be able, therefore, to effect an economic land acquisition scheme, providing the state with power, water, and other necessary services at economically feasible rates. The rights of the property owner, however, would be better protected with the supervision of the utility by a regulatory governmental agency. And the ultimate right of the property owner to be secure from an arbitrary or abusive taking of his property would be protected by his right of recourse to the courts.[131]

Conclusion

Land development in California has greatly increased in the three-quarters of a century since the *Stimson* doctrine was formulated. What was in 1891 a largely agrarian state has been transformed into a series of vast urban and suburban sprawls. What was grazing land or desert in 1891 is now premium acreage vital to growing metropolitan areas. Along with this growth in population and land use has come the growth of enormous private corporations to fill the needs of the public for power, water, and other services. The requirements of these corporations for land and easement rights has increased proportionately with the development of the state's lands and the increase of the state's population density. Also increasing proportionately with the development of the state's land is the capacity of the corporate public utility to do damage by the indiscriminate blighting of large areas by overland high power transmission towers or other utility facilities. It thus becomes more and more important that the property selected by public utility condemnors actually be the most compatible with the greatest public good and the least private injury. Perhaps interjecting an element of control by the Public Utilities Commission over the selection and location of

131 Under present law, no court other than the California Supreme Court has jurisdiction to review, correct, or reverse a decision or order of the Public Utilities Commission. CAL. PUB. UTIL. CODE § 1756; *see* Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119 (1913). Continuation of this rule would of course operate to circumscribe drastically the property owner's chances of receiving judicial review of the Commission's determination of compatibility. However, as above noted, the authority of the California legislature over the Public Utilities Commission is *plenary*. CAL. CONST. art. XII, § 23. The legislature could therefore provide for review of the Commission's initial determination of compatibility at a lower judicial level, preferably in the superior court. Such a change would be desirable and necessary in order to protect the property owner's right to ultimate recourse to the courts, with respect to the issue of compatibility.

public utility routes and facilities may provide a solution. Few will dispute that expert help is needed. Others may argue that further proliferation of administrative bureaucracy is too high a price to pay for the value received in this case. These, of course, are legislative questions.

But the issue of compatibility also poses a question for the courts. This is whether they will accept the role assigned to them by Code of Civil Procedure section 1242—and arbitrate the issue of compatibility —or whether they will refuse such a role and continue to follow the rules laid down in *Stimson*, which bear only upon the right of a *city* to condemn. It has been suggested that the courts are not well-equipped to function in such fashion, and that there may exist better methods of selecting routes for utility lines than that of passing the ultimate decision concerning their location to the judiciary. However, until the legislature sees fit to establish new methods, Code of Civil Procedure section 1242 places the burden of determining whether or not the location is most compatible with the greatest public good and the least private injury squarely on the courts. Hopefully, the judicial policy of deferring this question to the judgment of the utility condemnor, on the basis of principles formulated in *Pasadena v. Stimson*, will be re-examined.

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